BAN SENG LEONG SDN BHD & ORS

v.

KONG KON FAH & ORS

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CIVIL APPEAL NO: 11-13-1998]
4 DECEMBER 1998

CIVIL PROCEDURE: *Res judicata - Nature and scope of doctrine - Second application to amend defence after first application dismissed - Essence of first application different from that of second application - Whether second application amounts to reopening of same issue*

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Exception to issue estoppel - Second application to amend defence after first application dismissed - Second application based on facts not available at time of first application - Whether second application should be disallowed*

CIVIL PROCEDURE: *Amendment - Defence - Inclusion of additional defence - Whether amounts to changing nature and character of defence*

CIVIL PROCEDURE: *Amendment - Defence - Amendment during trial as a result of evidence given - Whether ought to be allowed - Whether would lead to unending attempts to amend throughout trial*

The appellants entered into a sale and purchase agreement to sell a particular flat to the respondents. Subsequently, the appellants commenced proceedings to claim a certain sum which they alleged was owing to them. The respondents filed their statement of defence but later, they applied for leave to amend their defence ('the first application') to include an allegation of breach of contract. The alleged breach was pertaining to the failure of the appellants to apply for the strata title to the property and to transfer ownership to the respondents. This application to amend their defence was, however, dismissed by the magistrate.

The suit then came up for trial and after the cross-examination of the appellants' first witness, the respondents filed another application to amend their defence ('the second application') to raise fraud contending that the appellants had collected purchase monies from the respondents and other purchasers but had no intention of fulfilling their obligations under the sale and purchase agreement. The second application was allowed and thus leave was granted to amend. The appellants appealed.

The appellants argued that the respondents' application should have been disallowed on grounds of *res judicata* in that they were seeking to reopen issues which they had sought but failed to do in the first application. Further and in any event, the appellants argued that the respondents were precluded from raising the issue of fraud because all matters that could have been raised in the first application but were not are nevertheless deemed to have been raised and thus the respondents were bound by the earlier decision of the magistrate. The appellants also contend that the amendment would change the nature and character of the defence and that if the respondents were allowed to amend their defence during the course of a trial then there will be no end to parties seeking to amend continually throughout trial.

The respondents submitted that the doctrine of *res judicata* had no application because the allegation of fraud was a separate and distinct issue from that of breach of contract which was raised in the first application. They contend that the amendment should be allowed as it came about as a result of facts arising during cross-examination of the appellants' first witness and thus the allegation was not available to be raised during the first application. Until then, the respondents had been led to believe that the appellants would be applying for sub-division and strata title.

Held:

[1] The respondents were not trying to reopen the same issue already raised in the first application under the guise of fraud. The essence of the first application was breach of contract, namely, the appellants' failure to take steps to fulfill their obligations to obtain subdivided and strata title to the said flat, whereas in the second application, what was complained of was the act of the appellants in leading the respondents into believing that steps were being taken to obtain sub-division and strata title when in fact the appellants had no intention of doing so.

[2] There is an exception to the plea of issue estoppel ie, it is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively *res judicata*. The rule of constructive *res judicata* is really a rule of estoppel. The respondents had brought themselves within this exception because the allegation of fraud was not available to them when the first application was made.

[3] The amendment allowed did not change the nature and character of the defence. This is because the respondents were not seeking to substitute their defences with one of fraud. Fraud constituted an

additional defence. The amendment was sought to put all matters in controversy between the parties into issue so that the court could adjudicate on them. The justice of this case required that the respondents be permitted to raise the allegation of fraud now as they were faced with the prospect of having to pay monies for a flat which they might never own because of the fraud of the appellants.

[4] If parties are allowed to amend their defence in the manner the respondents did, that is, during the course of a trial as a result of certain evidence coming to light, there is no danger that there will be no end to parties seeking to amend continually throughout a trial because any attempt to amend during a trial will require leave and the court will always be vigilant to ensure that any request to amend does not constitute an abuse of process.

[Appeal dismissed with costs.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 2 MLJ 74 ***(foll)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

For the appellants - KB Tan; M/s Ooi, Seah & Tan
For the respondents - Kerpal Singh; M/s U Harcharan & Kerpal

Reported by Cindy Chan

JUDGMENT

Clement Skinner JC:

This is an appeal brought by the plaintiffs (hereinafter the appellants) against the decision of the magistrate, who on 5 February 1998 granted leave to the defendants (hereinafter the respondents) to amend their defence to raise an allegation of fraud. The respondents' application to amend was in fact a second application, an earlier attempt having failed.

The facts relevant to this appeal may be shortly stated. On 7 April 1983 the appellants entered into a sale and purchase agreement (hereinafter the said agreement) with the respondents, selling to them a flat described as 2nd Floor, 31-B, Jalan Ampang, Kampar, erected on Lot 465, Kampar (hereinafter the said flat) for a sum of RM52,000.

On 17 December 1992 the appellants commenced these proceedings at the Sessions Court, Kampar, claiming a sum of RM21,419.14 being the balance due from the respondents in respect of the said flat as well as for overdue

interest, premium in respect of a policy of fire insurance and quit rents due on the said flat at the date of commencement of the suit.

In a defence filed on 6 August 1993, the respondents raised three defences, namely, (i) that the sale and purchase agreement entered into was a money lending transaction, (ii) the appellants' claim is baseless, premature and improperly brought as the appellants should first seek relief or remedy as provided in cl. 5 of the said agreement and (iii) the claim is frivolous, vexatious, oppressive and does not disclose any cause of action against the respondents.

On 20 November 1995 the respondents applied for leave to amend their defence to allege breach of contract and to put in a counterclaim (hereinafter the first application). Since what the respondents sought to do in their first application to amend is relevant in considering the appellants' objections in this appeal, I will set out the relevant parts below:

(New) para 5: Defendan mengatakan bahawa mengikut Clause 14 & 15 Perjanjian tersebut, Plaintif adalah diwajibkan untuk memohon hakmilik strata berkenaan harta tersebut dan memindahmilik hakmilik tersebut kepada defendan. Akan tetapi didalam kemungkiran perjanjian tersebut, walaupun berkali-kali permintaan dibuat oleh defendan kepada plaintif, plaintif telah enggan, abai dan gagal mendapatkan hakmilik strata dan memindahmilik kepada defendan dalam masa 30 hari dari tarikh perintah ini. Akibat dari kemungkiran plaintif, defendan telah menanggung kerugian.

(new): **Tuntutan Balas Defendan**

10. Defendan mengulangi perenggan 1 hingga 9 pembelaannya.

11. Disebabkan kemungkiran plaintif dalam perjanjian tersebut defendan menuntut balas terhadap plaintif untuk perintah bahawa:

(i) plaintif mendapatkan hakmilik strata asal harta di Tingkat Dua, 31-B, Jalan Ampang, Kampar yang dibina atas lot 465 Bandar Kampar dan memindahmilik serta menyerahkan hakmilik strata asal harta tersebut kepada defendan dengan bebas dari bebanan dalam masa 30 hari dari tarikh perintah ini.

(ii) Gantirugi

(iii) Kos.

The respondents' 1st application came up for hearing on 11 July 1996 when the respondents withdrew their application to put in the counterclaim and so the application proceeded only on the basis that the respondents sought to amend their defence. The learned magistrate dismissed the respondents' first application. There has been no appeal against that decision.

This suit then came on for trial. The record of appeal does not indicate the date the trial commenced but after cross-examination of the appellants' first witness, and apparently as a result of matters brought out in the cross-examination, the respondents put in an application (hereinafter the 2nd application) to amend their defence to raise an allegation of fraud.

The respondents sought to replace para. 6 of their defence with the following:

> 6. Defendan-defendan juga mengatakan bahawa niat plaintif-plaintif membawa tindakan ini adalah untuk menipu.
>
> **BUTIR-BUTIR NIAT UNTUK MENIPU**
>
> (a) Plaintif-Plaintif telah menggadaikan Lot-Lot 462 hingga 468 diatas mana mereka telah membina satu blok mengandungi 28 rumah pangsa (termasuk yunit Defendan-Defendan) kepada Southern Bank.
>
> (b) Plaintif-Plaintif telah kutip sepenuhnya harga jualan daripada pembeli-pembeli bagi yunit-yunit lain dalam Blok berkenaan, tetapi telah gagal menyelesaikan pinjaman dari Southern Bank itu.
>
> (c) Plaintif-Plaintif tidak mampu menyelesaikan hutang dengan Southern Bank dan sudah tentu Southern Bank akan melelongkan harta berkenaan, termasuk rumah Defendan-Defendan.
>
> (d) Plaintif-Plaintif juga telah membina satu blok mengandungi 16 yunit rumah pangsa (flats) diatas Lot-Lot 479-482 yang berhampiran. Lot-lot 479-482 itu digadaikan kepada OCBC Bank (M) Sdn. Bhd. Plaintif-Plaintif telah mengutip sepenuhnya harga jualan daripada pembeli-pembeli yunit-yunit bagi Lot-Lot itu tetapi gagal menyelesaikan hutang dengan bank itu dan bank telah mengambil tindakan untuk menjual Lot-Lot (termasuk yunit-yunit) secara lelongan awam (public auction).
>
> (e) Plaintif-Plaintif tidak ingin mendapat hakmilik strata bagi yunit-yunit pangsapuri di kedua-dua blok.
>
> (f) Plaintif-Plaintif telah gagal membalas permintaan daripada Pejabat Tanah dan Pendaftar Hakmilik untuk pecah bahagi bangunan dan seterusnya mendapat hakmilik strata.
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> (g) Plaintif-Plaintif hanya ingin kutip setiap sen yang mereka berhak mengutip, tetapi tidak ada sebarang niat untuk menanggung bebanan dan tanggungjawab dibawah perjanjian.

(h) Plaintif-Plaintif tidak berkemampuan dan tidak berkebolehan mematuhi perjanjian jual beli dan menyerah milikan kosong tanpa bebanan rumah itu sepertimana dijanjikan.

On 5 February 1998 the respondents' second application was heard by the learned magistrate who on 9 February 1998 granted leave to amend. The appellants being dissatisfied, have appealed.

The appellants rely on two grounds in bringing this appeal.

(i) The issue of fraud raised in the second amendment should have been disallowed on ground of *res judicata.*

(ii) The amendment changed the nature and character of the defence.

I shall now deal with each of these grounds and the competing contentions of the parties. First, the *res judicata* point. The appellants mount a two pronged attack here. They begin by saying that the respondents are seeking to reopen or reagitate issues which the respondents had sought but failed to do in their first application. The appellants then say that in any event, the respondents are precluded from raising the issue of fraud because all matters that could have been raised in the first application but were not are nevertheless deemed to have been raised wherefore the respondents are bound by the earlier decision of the magistrate.

Learned counsel for the respondents submits that the doctrine of *res judicata* has no application in this case because the allegation of fraud is a separate and distinct issue, quite different from the allegation of breach which was raised in the first application. The amendment should be allowed to stand as they came about as a result of facts elicited through cross-examination of the appellants' first witness. Until then, the respondents had been led to believe that the appellants would be applying for sub-division and strata title in respect of the said flat. In other words, the respondents also say the allegation was not available to be raised during the first application to amend wherefore *res judicata* will not apply.

Before deciding on this issue, it would be convenient to first state the law on the area that we are now concerned with. A clear statement on whether a party is allowed to reopen or reagitate an issue which has already been decided, is to be found in the case of *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74. This case is also authority on the point that a decision given by a court at one stage on a particular matter or issue is binding on it at a latter stage in the same suit or in a subsequent suit. This case was cited by learned counsel for the appellant who does not draw any support from the particular facts of the case but only relies upon it for the statement of law found therein. I therefore need only set out the following passage of the judgment of Sharma J, at p. 76:

In *Satyadhyan Ghosel and Others v. Sint Deorajin Dobi and Another* AIR [1960] SC 941, the statement of the law on the subject is given thus:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res judicata,* it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvas the matter again. This principle of *res judicata* is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
>
> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.
>
> A decision given by a Court at one stage on a particular matter or issue is binding on it at a latter stage in the same suit or in a subsequent suit. (See *Pecreth v. Marriott* [1883] 22 Ch D 182, *Hock v. Administrator-General of Bengal and Others* LR 48 IA 187 and *In the matter of the trusts of the will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141, 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalayya* LR 581A 381).

The above quoted passage in the judgment of Sharma J, has been expressly approved of by the Court of Appeal in *Hartecon JV Sdn. Bhd. & Anor v. Hartela Contractors Ltd.* [1997] 2 CLJ 104; [1996] 2 AMR 1457, where the issue before the Court of Appeal was whether a judge who had made a decision at one stage of the proceedings could at a later stage of the same proceedings reverse his earlier decision. The Court of Appeal held that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to, the rationale being that a decision made on a point renders that point taken *res judicata* between the parties.

Reverting now to the facts of the appeal before me, can it be said that by their second application the appellants were trying to reopen or reagitate the same issue already raised in their first application but this time around under

the guise of fraud? I have examined and considered both applications and have come to the conclusion that the respondents are not doing so. The essence of the complaint in the first application is breach of contract, namely, the appellants' failure to take steps to fulfill their obligation to obtain subdivided and strata title to the said flat, whereas in the second application, what is complained of is the act of the appellants in leading the respondents into believing that steps were being taken to obtain sub-division and strata title when in fact the appellants had no intention of doing so. The respondents also allege that in suing for the balance of the purchase price when they have no intention to repay the bank what is owed on the said lots, and thereby exposing the said flat to be auctioned off by the bank, the appellants have committed fraud upon them. To further substantiate their allegation, the respondents point to the fact that purchasers of other unit of flats who have paid the full purchase price for their flats to the appellants have recently had to face action taken by the bank to auction off their flats because the appellants have not paid to the bank what is owed on those flats. The respondents say they will suffer the same fate. For the reasons stated above, I reject the appellants' contention that the respondents are attempting to reagitate the same issue.

The argument on *res judicata* does not end there however, because the second prong of the appellants' attack is that all matters that could have been raised in the first application but were not are nevertheless deemed to have been raised wherefore the respondents are bound by the earlier decision.

In support of his above submission, learned counsel for the appellant relies upon the case of *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783; [1995] 3 MLJ 189 where Peh Swee Chin FCJ, speaking for the then Supreme Court, in reviewing important aspects of the doctrine of *res judicata* referred to the following celebrated words of Wigram, VC in the case of *Henderson v. Henderson* [1843] 3 Hare 100 p. 115:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

Peh Swee Chin FCJ then, after pointing out that the doctrine of *res judicata* actually encompassed two limbs, namely, cause of action estoppel and issue estoppel, went on to say with regard to issue estoppel:

> There is one school of thought that issue estoppel applies only to issues actually decided by the Court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought

a forward as described, though not actually decided by the Court, are still covered by the doctrine of *res judicata* i.e. doctrine of estoppel *per rem judicatum.*

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel.

b Learned counsel for the respondents submits that even applying the broader approach to the scope of issue estoppel, as described above, the respondents' second application would not be caught by issue estoppel because the allegation of fraud was not available to the respondents when the first application was made.

c The respondents say that right up to the time of trial of this action, they had been led to believe the appellants would subdivide and deliver strata title to the said flat. In support of their contention, the respondents refer to letters and documents which are exhibited in the record of appeal at pp. 42 through d to p. 54. These letters, dated from January 1997 onwards show the appellants were making noises about subdividing and paying rates. However, the respondents say that it was only during cross-examination that the true intentions of the appellants not to subdivide and not to repay to the bank became known. The letters and documents above-mentioned, which are relied e upon by the respondents, do lend some credence to their submissions in that they show a course of dealings between the respective solicitors for the appellants, the respondents and the land office regarding subdivision of the lots for purposes of issuance of strata titles. These letters are all dated from January 1997 onwards, whereas the respondents first application was made in 1995.

f In the case of *Government of Malaysia v. Dato' Chong Kok Lim (supra)* there is in the judgment of Sharma J, the following passage which is relevant in considering the second prong of the appellants attack. At p. 76, para 1, Sharma J says:

g There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of *res judicata* applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation h and which the parties exercising reasonable diligence might have brought forward at the time. *It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively res judicata. The rule of constructive res judicata is really a rule of estoppel.* (italics mine)

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Therefore, what is termed by Sharma J, above as constructive *res judicata* is what Peh Swee Chin FCJ in *Asia Commercial Finance* described as the "broader approach to the scope of issue estoppel". But the judgment of Sharma J, shows that there is an exception to the plea of issue estoppel. It is within the exception that I find the respondents have brought themselves in this case. I accordingly also reject the second prong of the appellants attack based on issue estoppel.

The next issue is whether the amendment allowed changed in the nature and character of the defence. The short answer to this is I do not think it did because the respondents are not seeking to substitute their defences with one of fraud. Fraud constitutes an additional defence. As pointed out by the respondents, the amendment was sought to put all matters in controversy between the parties into issue so that the court can adjudicate on them. Counsel for the respondents further submits that the justice of this case requires that the respondents be permitted to raise the allegation of fraud now. I find there is substance in the submission of the respondents. The respondents allege that they are now faced with the prospect of having to pay monies due upon a sale and purchase agreement for a flat which they may never own because of the fraud of the appellants. Whether or not the respondents succeed in such defence is a matter to be finally decided by the magistrate on the evidence before him, but for the present, I find that what the respondents are doing is to raise the very matters which if they do not now raise, they will in future be estopped from raising by the plea of *res judicata*. In fact learned Counsel for the appellants has already seen fit to submit that if the appellants are in breach of their obligations, the respondents have a redress in law for breach of contract, knowing full well that the respondents did try to do so in the first application but failed and therefore cannot reopen that issue again. In view of this stand taken by the appellants, I say there is all the more reason why the amendment should be allowed to stand.

There is one further matter I need to address. During submissions, learned counsel for the appellant argued that if the respondents are allowed to amend their defence in the manner they did, that is, during the course of a trial as a result of certain evidence coming to light, then there will be no end to parties seeking to amend continually throughout a trial. My answer to this submission is that there is no danger of this because any attempt to amend during a trial will require leave and the court will always be vigilant to ensure that any request to amend does not constitute an abuse of process and will only be allowed in proper cases.

For all the above reasons, I affirm the decision of the learned magistrate and dismiss this appeal with costs.